

No. 93-714

FEB 24 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

October Term, 1993

U.S. BANCORP MORTGAGE COMPANY,
Petitioner,

v.

BONNER MALL PARTNERSHIP,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

Bradford Anderson*
Dale G. Higer
David B. Levant
**Counsel of Record*
STOEL RIVES BOLEY
JONES & GREY
3600 One Union Square
600 University Street
Seattle, WA 98101-3197
(206) 624-0900
Counsel for Petitioner

Barbara Buchanan
John Ford Elsaesser, Jr.
Counsel of Record
ELSAESSER JARZABEK
& BUCHANAN, CHTD.
Third & Lake Streets
P.O. Box 1049
Sandpoint, ID 83864
(208) 263-8517
Counsel for Respondent

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1993
CERTIORARI GRANTED JANUARY 10, 1994

37 pp

TABLE OF CONTENTS

	<i>Page</i>
Chronological List of Relevant Docket Entries	1
Memorandum of Decision of Bankruptcy Court, Dated August 23, 1991	Pet. App. A118
First Amended Plan of Reorganization, Dated October 29, 1991	2
Memorandum of Decision of Bankruptcy Court, Dated December 6, 1991	29
Opinion and Order of District Court, Dated July 15, 1992	Pet. App. A90
Correction Order of District Court, Dated July 23, 1992	Pet. App. A88
Notice of Appeal, Dated August 14, 1992	Pet. App. A85
Opinion and Order of Court of Appeals, Dated August 4, 1993	Pet. App. A1
Excerpt of 11 U.S.C. § 1129	34

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 13, 1991 — Respondent Bonner Mall Partnership ("Bonner") files voluntary bankruptcy petition under Chapter 11 in U.S. Bankruptcy Court for the District of Idaho.

April 23, 1991 — Petitioner U.S. Bancorp Mortgage Company ("U.S. Bancorp") files motion for relief from stay in Bankruptcy Court.

August 23, 1991 — Bankruptcy Court issues first Memorandum of Decision.

October 31, 1991 — Bonner files First Amended Plan of Reorganization.

December 6, 1991 — Bankruptcy Court issues second Memorandum of Decision.

July 15, 1992 — District Court issues Opinion and Order.

July 23, 1992 — District Court issues Correction Order.

August 14, 1992 — U.S. Bancorp files Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit.

August 4, 1993 — Court of Appeals issues Opinion and Order.

ELSAESSER, JARZABEK, BUCHANAN
& DRESSEL
P.O. Box 1049
Sandpoint ID 83864
(208) 263-8517

SHULKIN, HUTTON & BUCKNELL,
INC., P.S.
1201 Third Avenue, Ste. 1900
Seattle WA 98101
(206) 623-3515
l:pld\bmp.pla

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF IDAHO

In Re:)
) Case No. 91-00801
BONNER MALL) FIRST AMENDED PLAN
PARTNERSHIP,) OF REORGANIZATION
)
Debtor.)
)
)

Bonner Mall Partnership, an Idaho general partnership, the Debtor in the above-captioned Chapter 11 case, proposes the following Plan of Reorganization pursuant to Subchapter II of Chapter 11 of the Bankruptcy Code:

ARTICLE I - DISCLOSURE STATEMENT

1. The Debtor has filed a Disclosure Statement pursuant to 11 U.S.C. § 1125 and Bankruptcy Rule 3016(c). The Disclosure Statement has been approved by the Bankruptcy Court prior to this Plan being submitted to creditors and equity security holders. The Disclosure Statement provides useful information to aid and assist creditors and equity security

FIRST AMENDED PLAN
OF REORGANIZATION

holders in voting on the Plan. YOU ARE URGED TO READ THE DISCLOSURE STATEMENT WITH CARE IN EVALUATING THE IMPACT OF THE PLAN UPON YOUR CLAIMS OR EQUITY SECURITY INTERESTS.

ARTICLE II - DEFINITION OF TERMS

2. A term used in this Plan that is not defined below and that is defined in the Bankruptcy Code shall have the meaning ascribed in the Bankruptcy Code. When used in this Plan, the following terms shall have the meanings specified below, unless the context otherwise requires:

2.1 **ALLOWED CLAIM:** Any claim in the amount and of the priority classification set forth in the proof of such claim that has been filed timely in the Reorganization Case, or in the absence of such proof, as set forth in the Debtor's schedules of liabilities filed in the Reorganization case, unless: (i) such claim has been listed in such schedules as disputed, contingent, or unliquidated, in which case such claim shall be allowed only in such amount and such classification as is authorized by Final Order of the Bankruptcy Court; (ii) such claim has been objected to or is objected to after Confirmation, in which case such claim shall be allowed only in such amount and such classification as if authorized by Final Order of the Bankruptcy Court; or, (iii) such claim has been paid in full, withdrawn, or otherwise deemed satisfied in full.

2.2 **ALLOWED INTEREST:** Any Equity Interest in the amount and of the priority classification set forth in the proof of such Equity Interest that has been filed timely in the Reorganization Case, or in the absence of such proof, as set forth in the debtor's listings and schedules filed in the Reorganization Case, unless: (i) such Equity Interest has been objected to or is objected to after confirmation, in which case

FIRST AMENDED PLAN
OF REORGANIZATION

such Equity Interest shall be allowed only in such amount and such classification as is authorized by Final Order of the Bankruptcy Court; or (ii) such Equity Interest has been paid in full, withdrawn, or otherwise deemed satisfied in full or retired.

2.3 **AS SOON AS PRACTICABLE:** Unless extended by court order, within thirty days following the occurrence of a triggering event.

2.4 **BANKRUPTCY CODE or CODE:** The Bankruptcy Code enacted November 6, 1978, as set forth in Title 11 of the United States Code, and as amended thereafter.

2.5 **BANKRUPTCY COURT or COURT:** The United States Bankruptcy Court for the District of Idaho, before which the Reorganization Case is pending, or if that Court ceases to exercise jurisdiction over the Bankruptcy Case, the Court that does exercise jurisdiction.

2.6 **CLASS:** A class of claims or equity security interests as defined in Article III of this Plan.

2.7 **CLASS 3 CLAIMS ORDER:** The order of the Bankruptcy Court making specific reference to this Plan which fixes and liquidates the amount of all Class 3 claims.

2.8 **CONFIRMATION:** The entry of the Order of Confirmation by the Bankruptcy Court.

2.9 **DEBTOR:** Bonner Mall Partnership, an Idaho partnership.

FIRST AMENDED PLAN
OF REORGANIZATION

2.10 **DISPUTED CLAIM:** A filed or scheduled claim of an alleged creditor as to which an objection has been filed by a party in interest.

2.11 **EFFECTIVE DATE:** The later of January 10, 1992, or eleven days after Confirmation unless the effect of the Order of Confirmation is stayed under Bankruptcy Rule 8005.

2.12 **ESTATE:** The Estate created pursuant to § 541 of the Bankruptcy Code.

2.13 **FINAL ORDER:** An order of the Bankruptcy Court confirming the Plan pursuant to Section 1129 of the Bankruptcy Code.

2.15 **PETITION DATE:** March 13, 1991, the date upon which the Debtor filed the Chapter 11 Petition commencing the Reorganization Case.

2.16 **PLAN:** This Plan of Reorganization in its present form or as it may be amended or modified from time to time pursuant to order of the Bankruptcy Court.

2.17 **PROFESSIONAL PERSONS:** Persons retained or to be compensated pursuant to §§ 326, 327, 328, 330 and/or 1103 of the Bankruptcy Code.

2.18 **PRO RATA:** Proportionally so that the ratio of the amount distributed on account of a particular Allowed Claim to the amount of such Allowed Claim is the same as the ratio of the amount distributed on account of all Allowed Claims in the Class of which such particular Allowed Claim is a member to the total amount of all Allowed Claims in such Class.

2.19 **REORGANIZATION CASE:** Chapter 11 case pending before the Bankruptcy Court commenced by the Debtor, designated Case No. 91-00801.

2.20 **REORGANIZED DEBTOR:** As provided by § 1141(d) of the Bankruptcy Code, Bonner Properties, Inc., an Idaho corporation as reconstituted, in accordance with the provisions of this Plan following the Effective Date, with assets that were formerly property of the Estate.

2.21 **SECURED CLAIM:** An Allowed Claim that is a secured claim against the Debtor determined in accordance with §§ 506 and 552 of the Bankruptcy Code.

2.22 **UNCLASSIFIED CLAIM:** An Allowed Claim described in § 507(a)(1), (2) or (7) of the Bankruptcy Code and any fees payable pursuant to 28 U.S.C. § 1930.

2.23 **UNSECURED CLAIM:** An Allowed Claim that is not a Secured Claim.

ARTICLE III - CLASSIFICATION OF CLAIMS AND INTERESTS

3. All claims, as defined in § 101(5) of the Bankruptcy Code, against the Debtor and all equity security interests, as defined in § 101(16) of the Bankruptcy Code, in the Debtor are classified as set forth herein. A claim or interest is in a particular Class only to the extent it qualifies within the definition of such Class and is in a different Class to the extent it qualifies within the definition of such different Class.

3.1 Priority Claims:

3.1.1 Class 1: All Allowed Claims against the Debtor entitled to priority pursuant to § 507(a)(3) of the Bankruptcy Code.

3.2 Secured Claims:

3.2.1 Class 2a: The Secured Claim of U. S. Bank, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

3.2.2 Class 2b: The Secured Claim of FNB, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

3.2.3 Class 2c: The Secured Claim of Panhandle State Bank, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

3.2.4 Class 2d: The Secured Claim of Triangle Development, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

3.2.5 Class 2e: The Secured Claim of D. L. Evans Bank, secured by property of the Estate, which property will be vested in the Reorganized Debtor in accordance with Paragraph 7.1.

3.3 Unsecured Claims.

3.3.1 Class 3a: All Allowed Claims against the Debtor, however arising, not entitled to priority and not otherwise included in any other Class hereof, including, without limitation, claims based upon the rejection of executory contracts or unexpired leases.

3.3.2 Class 3b: Any Allowed Claims against the Debtor, which total \$1,000 or less and which would otherwise be Class 3a claims and any claims which would otherwise be Class 3a claims but for which the holder elects to be treated as a Class 3b claims holder.

3.3.3 Class 3c: Any Allowed Claims of Lloyd Andrews, H. F. Magnuson and the Debtor's partners which are not Unclassified Claims, which are not entitled to priority and which are not otherwise included in any other Class hereof.

3.4 Equity Interests.

3.4.1 Class 4: The Allowed Interests of all partners of the debtor.

ARTICLE IV

CLAIMS AND INTERESTS NOT IMPAIRED BY THE PLAN

4. The Allowed Claims in Class 1 are not impaired under the Plan.

ARTICLE V.

PROVISIONS FOR SATISFYING CLAIMS

AND SPECIFYING TREATMENT OF

EACH CLASS UNDER THE PLAN

5. The treatment of all Allowed Claims and Allowed Interests are specified as follows:

5.1 Unclassified Claims: Unclassified Claims, upon allowance by the Court will be paid as follows:

5.1.1 Each holder of an Allowed Claim entitled to priority pursuant to § 507(a)(1) of the Code shall receive, from the Reorganized Debtor, as soon as practicable following the later of (a) the Effective Date or (b) the date upon which an order of the Court allowing such claim becomes a Final Order, cash in the amount of such Allowed Claim unless the holder of such Unclassified Claim agrees to different treatment, except for certain ordinary course of business Unclassified Claims, the treatment of which is specified in Paragraph 5.1.2 below; provided that all fees payable pursuant to 28 U.S.C. § 1930 shall be paid prior to or on the Effective Date.

5.1.2 Unclassified Claims incurred by the Debtor during the pendency of the case shall be assumed and paid in the ordinary course of business by the Reorganized Debtor after the Effective Date.

5.1.3 Allowed Claims of governmental units entitled to priority pursuant to § 507(a)(7) of the Code and not otherwise included in any other Class hereof shall be paid by the Reorganized Debtor in twelve (12) equal quarterly cash

FIRST AMENDED PLAN
OF REORGANIZATION

payments commencing on the final day of the first full fiscal quarter of the Reorganized Debtor following the later of (a) the Effective Date or (b) the date upon which an order of the Court allowing such claim becomes a Final Order, and amortized with interest over such twelve quarter period. The amortization shall be based on simple interest at a rate equal to seven percent (7%) per annum unless the Court establishes, after notice and a hearing, a different market rate of interest. Any holder of a claim entitled to priority under § 507(a)(7) shall, within the same deadline and in the same manner established for objections to confirmation, file any objection it may have to the proposed interest rate, identify the proposed alternative rate, and set forth the facts and circumstances justifying such rate. Failure to object to the proposed interest rate shall be deemed to be a consent thereto. The holder of an Allowed Claim entitled to priority pursuant to § 507(a)(7) of the Code shall not be entitled to receive any payment on account of any Post-Petition Date penalty or interest with respect to or arising in connection with its claim; and any such claim or demand for Post-Petition Date penalties or interest shall be discharged by Confirmation of this Plan under 1141(d)(1) of the Code, and the holder of such claims shall not assess or attempt to collect such penalty or interest from the Reorganized debtor.

5.2 Priority Claims:

5.2.1 Class 1: Class 1 claims are not impaired under this Plan. Each holder of a Class 1 Allowed Claim shall be paid the entire amount of such holder's Allowed Claim by the Reorganized Debtor on the later of (a) the Effective Date or (b) the date upon which an order of the Court allowing such claim becomes a Final Order.

FIRST AMENDED PLAN
OF REORGANIZATION

5.3 Secured Claims:

5.3.1 Class 2a: The holder of the Class 2a claim is impaired under this Plan. Unless the Reorganized Debtor and the holder of the Class 2a claim otherwise agree to alternative treatment of the claim, the Class 2a Claim shall be satisfied in the manner described in Paragraph 5.3.1.1 below, or if U. S. Bank properly elects application of § 1111(b) of the Bankruptcy Code, then the Class 2a claim shall be satisfied in the manner described in Paragraph 5.3.1.2 below.

5.3.1.1. U. S. Bank, the holder of the Secured Claim constituting the Class 2a claim, shall retain its lien securing its Secured Claim and shall receive 31 monthly cash payments in an amount equal to the interest accruing on the Allowed Secured Claim followed by a payment of the full amount of the Allowed Secured Claim on the 32nd monthly anniversary of the Effective Date. The payments shall be made by the Reorganized Debtor and the first payment shall be made on the first monthly anniversary of the Effective Date. For the purposes of this Plan, the Allowed Secured Claim shall be deemed to equal \$3,200,000, the fair market value of the collateral as determined by the Bankruptcy Court on August 23, 1991 plus the amount U.S. Bank has expended on Court authorized roof repairs through confirmation exclusive of funds derived from rent proceeds, offset by any insurance proceeds received. Interest shall be calculated at the lesser of 7% per annum or the rate specified in the contract between the Debtor and U. S. Bank, or at the rate set by the Bankruptcy Court at confirmation.

On the effective date of the Plan, the Debtor shall deposit in an escrow account a Deed in Lieu of Foreclosure in favor of U. S. Bank to the Bonner Mall. In the event Bonner Properties, Inc. fails to make the monthly cash payments to

U.S. Bank, fails to pay the property taxes and insurance on the Bonner Mall as they become due, fails to complete the repairs to the mall roof on or before October 15, 1992, or fails to pay the full amount of the Allowed Secured Claim on the 32nd monthly anniversary of the Effective Date, Debtor shall, upon appropriate motion and hearing by U.S. Bank, deliver the deed to the Bank. The Deed in Lieu of Foreclosure shall be the equivalent of a non-judicial foreclosure and in the event U.S. Bank exercises its right to the Deed, it will have foregone any right to seek a deficiency judgment pursuant to State Mortgage Foreclosure Law.

5.3.1.2 If the holder of the Class 2a claim is entitled to and does timely make an election under §1111(b) of the Bankruptcy Code, U.S. Bank shall retain its lien and its entire Allowed Claim, without interest, shall be paid by the Reorganized Debtor in equal monthly installments over a period of time, not less than thirty (30) years in duration, which period shall be set by the Court at the hearing on confirmation so as to result in a valuation of the payments to be made by the Reorganized Debtor, on a present discounted basis, being equal to the holder's Secured Claim. The first payment shall commence on the Effective Date.

5.3.1.3 Pursuant to the provisions of § 1129(b) of the Bankruptcy Code, the Debtor requests that the Court confirm the Plan without the consent of U. S. Bank.

5.3.2 Class 2b: The holder of the Class 2b claim is impaired under this Plan. Unless the Reorganized Debtor and the holder of the Class 2b claim otherwise agree to alternative treatment of the claim, the Class 2b claim shall be satisfied in the manner described in Paragraph 5.3.2.1 below, or if First National Bank of North Idaho (FNB) properly elects application of § 1111(b) of the Bankruptcy Code, then the

Class 2b claim shall be satisfied in the manner described in Paragraph 5.3.2.2 below.

5.3.2.1 FNB, the holder of the Secured Claim constituting the Class 2b claim, shall retain its lien securing its Secured Claim and shall receive a payment of the full amount of the Allowed Secured Claim plus the interest accruing on such Allowed Secured Claim from the Effective Date on the 32nd monthly anniversary of the Effective Date. The payment shall be made by the Reorganized Debtor. For the purposes of this Plan, the Allowed Secured Claim shall be deemed to equal \$400,000, the fair market value of the collateral. Interest shall be calculated at the lesser of 7% per annum or the rate specified in the contract between the Debtor and FNB, or at the rate set by the Bankruptcy Court at confirmation.

5.3.2.2 If the holder of the Class 2b claim is entitled to and does timely make an election under § 1111(b) of the Bankruptcy Code, then FNB shall retain its lien and its entire Allowed Claim, without interest, shall be paid by the Reorganized Debtor in equal monthly installments over a period of time, not less than thirty (30) years in duration, which period shall be set by the Court at the hearing on confirmation so as to result in a valuation of the payments to be made by the Reorganized Debtor, on a present discounted basis, being equal to the holder's Secured Claim. The first payment shall commence on the Effective Date.

5.3.2.3 Pursuant to the provisions of § 1129(b) of the Bankruptcy Code, the Debtor requests that the Court confirm the Plan without the consent of FNB.

5.3.3 Class 2c: The holder of the Class 2c claim is impaired under this Plan. Unless the Reorganized Debtor and the holder of the Class 2c claim otherwise agree to alternative

treatment of the claim, the Class 2c claim shall be satisfied in the manner described in Paragraph 5.3.3.1 below, or if Panhandle State Bank (PSB) properly elects application of § 1111(b) of the Bankruptcy Code, then the Class 2c claim shall be satisfied in the manner described in Paragraph 5.3.3.2 below.

5.3.3.1 PSB, the holder of the Secured Claim constituting the Class 2c claim, shall retain its lien securing its Secured Claim and shall receive monthly cash payments of \$800 until the Class 2c claim is paid. The payments shall be made by the Reorganized Debtor and the first payment shall be made on the first monthly anniversary of the Effective Date. For the purposes of this plan, the Allowed Secured Claim shall be deemed to equal \$40,000, the fair market value of the collateral on the Petition Date minus all payments made to PSB after the Petition date. Interest shall be calculated at the lesser of 7% per annum or the rate specified in the contract between the Debtor and PSB, or at the rate set by the Bankruptcy Court at confirmation.

5.3.3.2 If the holder of the Class 2c claim is entitled to and does timely make an election under § 1111(b) of the Bankruptcy Code, PSB shall retain its lien and its entire Allowed Claim, without interest, shall be paid by the Reorganized Debtor in equal monthly installments over a period of time, not less than ten (10) years in duration, which period shall be set by the Court at the hearing on confirmation so as to result in a valuation of the payments to be made by the Reorganized Debtor, on a present discounted basis, being equal to the holder's Secured Claim. The first payment shall commence on the Effective Date.

5.3.3.3 Pursuant to the provisions of § 1129(b) of the Bankruptcy Code, the Debtor requests that the Court confirm the Plan without the consent of PSB.

5.3.4 Class 2d: The holder of the Class 2d claim is impaired under this Plan. Unless the Reorganized Debtor and the holder of the Class 2d claim otherwise agree to alternative treatment of the claim, the Class 2d claim shall be satisfied in the manner described in Paragraph 5.3.4.1 below, or if Triangle Development Company (Triangle) properly elects application of § 1111(b) of the Bankruptcy Code, then the Class 2d claim shall be satisfied in the manner described in Paragraph 5.3.4.2 below.

5.3.4.1 Triangle, the holder of the Secured Claim constituting the Class 2d claim, shall retain its lien securing its Secured Claim and shall receive four annual cash payments in an amount equal to the interest accruing on the Allowed Secured Claim followed by a payment of the full amount of the Allowed Secured Claim on the fifth anniversary of the Petition Date. The payments shall be made by the Reorganized Debtor and the first payment shall be made on the first anniversary of the Petition Date. For the purposes of this Plan, the Allowed Secured Claim shall be deemed to equal the principal amount of the claim on the Petition Date plus the interest accrued through the Petition Date, which is less than the fair market value of the collateral. Interest shall be calculated at the lesser of 7% per annum or the rate specified in the contract between the Debtor and Triangle, or at the rate set by the Bankruptcy Court at confirmation.

5.3.4.2 If the holder of the Class 2d claim is entitled to and does timely make an election under § 1111(b) of the Bankruptcy Code, then Triangle shall retain its lien and its entire Allowed Claim, without interest, shall be paid by the

Reorganized Debtor in equal monthly installments over a period of time, not less than thirty (30) years in duration, which period shall be set by the Court at the hearing on confirmation so as to result in a valuation of the payments to be made by the Reorganized Debtor, on a present discounted basis, being equal to the holder's Secured Claim. The first payments shall commence on the Effective Date.

5.3.4.3 Pursuant to the provisions of § 1129(b) of the Bankruptcy Code, the Debtor requests that the Court confirm the Plan without the consent of Triangle.

5.3.5 Class 2e: The holder of the Class 2e claim is impaired under this Plan. Unless the Reorganized Debtor and the holder of the Class 2e claim otherwise agree to alternative treatment of the claim, the Class 2e claim shall be satisfied in the manner described in Paragraph 5.3.5.1 below, or if D. L. Evans Bank properly elects application of § 1111(b) of the Bankruptcy Code, then the Class 2e claim shall be satisfied in the manner described in Paragraph 5.3.5.2 below.

5.3.5.1 D. L. Evans Bank, the holder of the Secured Claim constituting the Class 2e claim, shall retain its lien securing its Secured Claim and shall receive monthly cash payments in an amount equal to \$2,775 until its Allowed Secured Claim together with interest accruing following the Effective Date is paid. The payments shall be made by the Reorganized Debtor and the first payment shall be made on the first monthly anniversary of the Effective Date. For the purposes of this Plan, the Allowed Secured Claim shall be deemed to equal the outstanding principal balance of the claim as of the Effective Date after giving effect to the post Petition Date payments, which is less than the fair market value of the collateral. Interest shall be calculated at the lesser of 7% per annum or the rate specified in the contract between the Debtor

and D. L. Evans Bank, or at the rate set by the Bankruptcy Court at confirmation.

5.3.5.2 If the holder of the Class 2e claim is entitled to and does timely make an election under § 1111(b) of the Bankruptcy Code, then D. L. Evans Bank shall retain its lien and its entire Allowed Claim, without interest, shall be paid by the Reorganized Debtor in equal monthly installments over a period of time, not less than thirty (30) years in duration, which period shall be set by the Court at the hearing on confirmation so as to result in a valuation of the payments to be made by the Reorganized Debtor, on a present discounted basis, being equal to the holder's Secured Claim. The first payment shall commence on the Effective Date.

5.3.5.3 Pursuant to the provisions of § 1129(b) of the Bankruptcy Code, the Debtor requests that the Court confirm the Plan without the consent of D. L. Evans Bank.

5.4 Unsecured Claims:

5.4.1 Class 3a: Class 3a claims are impaired under this Plan. In full and complete satisfaction of Class 3a claims, holders of Allowed Claims in Class 3a shall receive, As Soon As Practicable following the date the Class 3 Claims Order becomes a Final Order, a Pro Rata distribution of Class A Preferred Stock issued by the Reorganized Debtor pursuant to the provisions of Paragraph 7.3 of the Plan. Fractional shares shall not be issued.

5.4.2 Class 3b: Class 3b claims are impaired under this Plan. In full and complete satisfaction of Class 3b claims, holders of Allowed Claims in Class 3b shall receive a cash payment equal to the lesser of 10% of the allowed amount of their claims or \$100. The payment shall be made by the

Reorganized Debtor As Soon As Practicable following the date an order of the court allowing any class 3b claim becomes a Final Order.

5.4.3 Class 3c: Class 3c claims are fully impaired under this Plan. Class 3c claims shall receive no stock distribution or cash payment.

5.5 Equity Security Interests.

5.5.1 Class 4: The holders of Class 4 interests shall retain no interest in the Debtor and any interests held by such holders shall be canceled on the Effective Date.

ARTICLE VI.

TREATMENT OF DISPUTED CLAIMS AND INTERESTS

6. Except as provided in Paragraph 5.4.2 above, all Disputed Claims will be resolved prior to any distributions by the Reorganized Debtor. Equity Security Interests are not entitled to any distributions from the Reorganized Debtor under this Plan.

ARTICLE VII.

MEANS FOR EXECUTION OF THE PLAN

7. The Debtor, the Estate, and Reorganized Debtor shall each perform or shall have performed all the acts required of them below, (unless the Debtor, the Estate, and the Reorganized Debtor all shall agree to perform such acts at an earlier time) on the Effective Date of the Plan.

7.1 All assets of the Estate shall be vested in the Reorganized Debtor in accordance with 11 U.S.C. § 1141 and the Reorganized Debtor shall be free to manage its affairs with no further Court intervention, including the lawful manner of selecting directors and officers.

7.2 The existing partners, the five trusts, and Lloyd Andrews shall make a capital contribution to the Reorganized Debtor in an amount equal to \$200,000. In the event of a shortfall in working capital, for the 32 month period between the Effective Date of the Plan and the date the note to U.S. Bank comes due, the new shareholders will contribute any funds necessary to make the monthly payments under the Plan and to pay the reasonable and ordinary operating expenses of the Mall. In consideration of the required capital contribution, the Reorganized Debtor shall issue two million of the four million authorized shares of common stock, in accordance with the terms of this Plan and the Amended Articles of Incorporation required hereby, to the former partners. The common stock and the Class A preferred stock to be issued by the Reorganized Debtor to the holders of Class 3a unsecured claims are the only securities authorized by this Plan and no other equity securities are authorized or are to be issued by the Reorganized Debtor pending final consummation of this Plan.

7.3 Three hundred thousand Class A preferred shares shall be issued by the Reorganized Debtor to the holders of Class 3a unsecured claims. The Class A preferred stock shall have a par value of \$1.00 per share, shall be convertible, at any time after the final payment of the Class 2a secured claim and prior to redemption, into fifteen percent (15%) of the then outstanding common stock of the Reorganized Debtor, shall have a preference equal to the par value upon the liquidation of the Reorganized Debtor, and shall be redeemable

at par, at the option of the Reorganized Debtor, and shall be entitled to vote, on the same basis as the common shares.

7.4 U.S. Bank shall transfer all funds it holds as collections from the rents of the property to the Reorganized Debtor.

7.5 H. F. Magnuson shall provide a collateral trust mortgage to the Reorganized Debtor which shall act as additional collateral for any creditor to insure that the entire indebtedness assumed by the Reorganized Debtor in conjunction with this Plan is paid in accordance with the terms of the Plan. The collateral trust Mortgage shall encumber approximately 4,500 acres of real property located generally on the Rathdrum Prairie. The collateral trust mortgage shall be junior to existing liens on the Rathdrum property which secure approximately \$2,500,000. H. F. Magnuson shall continue to service \$1,500,000 of the indebtedness encumbering the property and in partial exchange for providing the collateral trust mortgage, the Reorganized Debtor shall pay the debt service on approximately \$902,000 of the debt encumbering the property.

7.6 On the Effective Date of the Plan, the Reorganized Debtor and Bonner Properties, Inc. shall assume responsibility for completing the \$300,000.00 in court authorized repairs to the mall roof begun by U.S. Bank. Said work shall be performed under the direct supervision of architect, Ferman Pasold, and with consultation from U.S. Bank. The remaining work will be contracted for completion on or before October 15, 1992.

7.7 Notwithstanding any provision to the contrary in this Plan, all rights, claims, and causes of action, whether equitable or legal, of the Debtor, the Estate, or the

Reorganized Debtor against all persons arising under any provision of the Bankruptcy Code, under state or federal law for the recovery of avoidable fraudulent conveyances or other transfers or under any other State or Federal law, shall be vested in the Reorganized Debtor. During the pendency of the Reorganization Case, prior to or following Confirmation, the Debtor-in-Possession or the Reorganized Debtor may commence adversary proceedings against persons or entities to realize upon any such causes of action. Any settlements shall be subject to review by the Bankruptcy Court, after appropriate notice and hearing in accordance with the Bankruptcy Rules.

7.8 The Reorganized Debtor shall cause Amended Articles of Incorporation, in the form approved by the Court at the hearing on confirmation, to be filed in accordance with state law.

7.9 Any objection to a claim by a party in interest in the Reorganization Case must be filed on or before one hundred twenty (120) days following the Effective Date unless said time period is extended by the Bankruptcy Court for cause shown; provided, however, that the foregoing limitation does not apply to any claims filed subsequent to Confirmation.

7.10 Pursuant to Section 347(b) of the Bankruptcy Code, ninety (90) days after any distribution by the Reorganized Debtor provided for herein, the Reorganized Debtor shall stop payment on any check remaining unpaid or cancel any stock issued to a holder of an Allowed Claim and any funds or canceled shares shall be returned to the Reorganized Debtor. From and after the date the Reorganized Debtor stops payment on any distribution check or cancels shares pursuant to paragraph 7.9, the holder of the claim on account of which such check or shares were issued shall be entitled to receive no further distributions on account of his

claim and such holder's Allowed Claim shall thereupon be deemed satisfied in full.

7.11 The deadline for submission of all claims entitled to priority pursuant to Sections 507(a)(1), (a)(2) and (b) of the Bankruptcy Code incurred prior to Confirmation, with the exception of fees and costs of Professional Persons shall be thirty (30) days following Confirmation. Failure to file a claim by this date shall conclusively bar the claimant from asserting his claim, which claim shall be forever discharged.

7.12 Any negotiable instrument held by the holder of an impaired Allowed Claim shall be deemed exchanged, canceled, or satisfied, as the case may be on the Effective Date.

7.13 The Reorganized Debtor shall timely make all payments required under this Plan.

ARTICLE VIII EXECUTORY CONTRACTS AND UNEXPIRED LEASES

8 The treatment of executory contracts and unexpired leases is specified below.

8.1 All executory contracts and unexpired leases of the Debtor not heretofore assumed or rejected, shall be assumed by the Debtor on the Effective Date, except those executory contracts and unexpired leases listed in the "Schedule of Rejected Executory Contracts" which is attached hereto as Exhibit A. Any claim arising from the rejection of an executory contract is a Class 3a claim and, any entity holding a claim based upon the rejection of an executory contract or unexpired lease pursuant to this Article must file a Proof of Claim with the Bankruptcy Court within 30 days after

Confirmation. The failure of any such entity to file a Proof of Claim within the specified time period will result in the disallowance of such claim.

8.2 With regard to those executory contracts and unexpired leases which are not listed on Exhibit A, on the Effective Date, or as soon thereafter as is practicable, the Reorganized Debtor shall (a) cure the arrearages, if any, in such amounts as may be determined by the Court at the hearing on Confirmation or thereafter and (b) assume said executory contracts. Any party to an executory contract or unexpired lease scheduled for assumption as provided in this paragraph 8.2 shall, within the same deadline and in the same manner established for objections to confirmation, file any claim for arrearages required to be cured by Section 365(b)(1) of the Bankruptcy Code and any objections to the assumption. Failure to assert such arrearages or to file any objections shall constitute an agreement to the assumption and an acknowledgment that no defaults or claims exist under said contract which require a cure.

ARTICLE IX SATISFACTION OF INDEBTEDNESS AND DISCHARGE OF CLAIMS

9 The distribution made to the various Classes of creditors as provided for in this Plan shall be in full and complete satisfaction of their Allowed Claims. Except as otherwise provided in the Plan or the Order of Confirmation, Confirmation shall operate, as a discharge of any and all debts and claims as defined in Section 101(4) of the Bankruptcy Code against the Debtor or the Estate that arose at any time prior to Confirmation. The discharge of the Debtor and the discharge of claims against the Debtor, whether asserted against the Debtor or the Reorganized Debtor, shall be

FIRST AMENDED PLAN
OF REORGANIZATION

effective as to each claim, regardless of whether or not (a) the claim was scheduled, (b) a proof of claim was filed, (c) the claim is an Allowed Claim, or (d) the holder thereof voted to accept the Plan.

ARTICLE X MODIFICATIONS OF THE PLAN

10 Pursuant to the provisions of Section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, the Debtor reserves the right to modify or alter the provisions of the Plan at any time prior or subsequent to Confirmation.

ARTICLE XI CORPORATE STRUCTURE

11 Pursuant to the requirements of Section 1123(a)(6) of the Bankruptcy Code, upon Confirmation, the Debtor will seek an order of the Court approving the Reorganized Debtor's Amended Articles of Incorporation, which Articles will set forth the rights and privileges of the holders of common stock and which will include, among other matters, a prohibition on the Reorganized Debtor's issuance of non-voting securities and as to additional authorized classes of securities, if any, an appropriate distribution of voting power, including, in the case of any class having a preference over another class with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in payment of such dividends.

FIRST AMENDED PLAN
OF REORGANIZATION

**ARTICLE XII
RETENTION OF JURISDICTION
BY THE BANKRUPTCY COURT**

12 Notwithstanding Confirmation, until entry of a final decree, the Bankruptcy Court shall retain jurisdiction to ensure that the purposes and intent of the Plan are carried out. Without limiting the generality of the foregoing, the Court shall retain jurisdiction for the following purposes:

12.1 Fixing and allowing any claim as a cost and expense of the administration of the Reorganization Case;

12.2 Reexamining any claim that has been allowed;

12.3 Hearing and determining any objection to a claim or interest. The failure of the Debtor to object to, or to examine any claim or equity security interest for the purpose of voting, shall not be deemed to be a waiver of the Debtor's right to object to, or re-examine any claim or equity security interest in whole or in part;

12.4 Hearing and determining any action brought by the Debtor or the Estate seeking to avoid any transfer of an interest of the Debtor in property, or any obligation incurred by Debtor, that is avoidable pursuant to applicable law;

12.5 Hearing and determining all causes of action, controversies, disputes, or conflicts between or among the Debtor and any other party, including those that were pending prior to Confirmation;

12.6 Hearing and determining all questions and disputes regarding title to the property of the Debtor or the Estate;

**FIRST AMENDED PLAN
OF REORGANIZATION**

12.7 Correcting any defect, curing any omission, or reconciling any inconsistency in the Plan or the Order of Confirmation as may be necessary to carry out the purpose and intent of the Plan;

12.8 Hearing and determining any action brought by the Debtor to protect the Debtor and the Estate from actions of creditors, equity security holders, or other parties in interest;

12.9 Issuing any order necessary to implement the Plan or Order of Confirmation, including, without limitation, such declaratory and injunctive orders as are appropriate to protect the Debtor, the Estate, and the Reorganized Debtor from actions of creditors, equity security holders, or other parties in interest;

12.10 Hearing and determining any dispute relating to the terms or implementation of the Plan or Order of Confirmation, or to the rights or obligations of any parties in interest with respect thereto;

12.11 The modification of the Plan after Confirmation pursuant to the Bankruptcy Rules and the Bankruptcy Code in accordance with Article X above; and

12.12 Entering orders concluding and terminating the Reorganization Case.

**FIRST AMENDED PLAN
OF REORGANIZATION**

DATED this 29 day of October, 1991.

SHULKIN, HUTTON & BUCKNELL,
INC., P.S.

ELSAESSER, JARZABEK, BUCHANAN
& DRESSEL

/s/ Barbara Buchanan
BARBARA BUCHANAN, Attorneys for
Debtor-in-Possession

FIRST AMENDED PLAN
OF REORGANIZATION

EXHIBIT "A"

SCHEDULE OF REJECTED EXECUTORY CONTRACTS
AND UNEXPIRED LEASES

Non-Debtor Party

Nature of Agreement

FIRST AMENDED PLAN
OF REORGANIZATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In Re:)	
)	
BONNER MALL)	Case No. 91-00801-11
PARTNERSHIP,)	
)	MEMORANDUM
Debtor.)	OF DECISION
)	
)	

J. Ford Elsaesser and Barbara A. Buchanan, ELSAESSER,
JARZABEK & BUCHANAN, Sandpoint, Idaho, for debtors.

Dale G. Higer, STOEL, RIVES, BOLEY, JONES & GREY,
Boise, Idaho, for U.S. Bancorp.

U.S. Bancorp Mortgage Company (Bancorp) has renewed its motion for relief from the Section 362 automatic stay or for dismissal of the chapter 11 case filed by the debtor-in-possession, the Bonner Mall Partnership. The motions were previously denied; the debtor was ordered to file a plan, and Bancorp authorized to renew its motions to test the confirmability of the debtor's proposed chapter 11 plan. The present motions constitute such renewal.

The issue is whether the debtor's proposed plan bears any possibility of success of confirmation under the provisions of 11 U.S.C. § 1129.

Findings and conclusions in the previous motions process included the conclusion Bancorp was not entitled to relief from the Section 362 automatic stay under 11 U.S.C. § 362(d)(2). In the instant, renewed, motions, the same conclusion will be entered. While the debtor-in-possession may possess no equity in the Bonner Mall, it obviously is necessary for an effective reorganization, and no cause has been shown to exist for a modification, or total relief, from the

automatic stay under 11 U.S.C. § 362(d)(1), other than the issue of the inability of the debtor to obtain confirmation of the chapter 11 plan.

Both the issues of the motion to dismiss and the motion for stay relief must be resolved solely on the basis of the confirmability of the debtor's proposed plan. Any benefit of the doubt in this regard ought to be afforded the debtor, and only if there is no chance of confirmation under the provisions of Section 1129 should the motions be granted.

THE PLAN

The proposed plan of reorganization provides for the transfer of all of the assets of the debtor-in-possession to a corporation. The new corporation will be the reorganized debtor, or, the entity created by the chapter 11 plan to carry out the reorganization process through the performance of the plan provisions. All unsecured creditors, with the exception of the Magnuson Children's Trusts, will receive shares in a class of preferred stock in the reorganized debtor corporation. After the payment of the secured claim of Bancorp in the amount of \$3.2 million, the preferred stock will be converted into 15% of the then outstanding shares of common stock in the reorganized debtor corporation. The preferred stock is also given a liquidation preference ahead of the common stock on the basis of its \$1.00 per share par value. The existing equity holders in the partnership comprising the debtor-in-possession will make a capital contribution of \$200,000.00, and H.F. Magnuson will assign to the reorganized debtor a collateral trust mortgage in which there purportedly exists an equity of \$2 million.

DISCUSSION

Previous findings of the value of the Bonner Mall, of \$3.2 million, the amount of the claim of Bancorp, and the provisions of 11 U.S.C. § 1129, including Section

1129(b)(2)(B), led to the opinion announced in the previous motions process that it would be extremely difficult for the debtor to obtain confirmation of a chapter 11 plan. Since Bancorp controls the class of unsecured creditors, the debtor cannot obtain confirmation of a plan under Section 1129(a) and thus must resort to the provisions of Section 1129(b). The main impediment to confirmation, under Section 1129(b), is the absolute priority rule¹, with which provisions the debtor must comply in order to meet the "fair and equitable" test of that section.

Bancorp contends the debtor's proposed plan cannot satisfy the "fair and equitable" requirement since the plan does not comply with the absolute priority rule. Bancorp argues the absolute priority rule is violated since the Bank will not be receiving payment of its unsecured claim in full, while the debtor is retaining an interest in the property.

In response, the debtor-in-possession argues the absolute priority rule is satisfied by the "new contribution" feature of its plan, whereby new capital is being contributed to the plan by existing equity shareholders of the debtor, which additional capital is "reasonably equivalent" to the value of the property interests the debtor is retaining through the plan.

Bancorp argues the "new contribution" theory, which resulted from a United States Supreme decision² is not a viable concept under the 1978 Bankruptcy Code³ and should not be available to the debtor-in-possession.

¹ 11 U.S.C. § 1129(b)(2)(B)(ii).

² *Case v. City of Los Angeles Lumber*, 308 U.S. 106 (1939).

³ Pub.L. 95-598, Nov. 6, 1978.

Since the time of the previous decision on this subject in this case, the Fifth Circuit Court of Appeals in *Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture*⁴ has held the new value exception is not available under the Bankruptcy Code.⁵ The opinion holds the 1978 Bankruptcy Code did not provide for new value exception to the absolute priority rule. The Court discussed the effect of allowing the exception under the present Code and found that to do so would allow "old equity" to retain control of, and run, the reorganized debtor while impairing the rights of dissenting secured creditors and that such treatment is not authorized and should not be authorized under the present statutes.

The *Greystone* analysis is convincing, as is the reasoning to like effect in *In re Outlook/Century, Ltd.*⁶ As in *Greystone*, to allow the debtor equity holders in this case to retain controlling interest in the new entity while reducing the

⁴ No. 90-8529, 1991 U.S. App. LEXIS 27096 (5th Cir. Nov. 19, 1991).

⁵ *Greystone* states the status of the decision on this subject in footnote 8: "*In Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 108 S.Ct. 963, 967 n.3 (1988), the Supreme Court expressly declined to rule on whether a "new value exception" to the absolute priority rule survived enactment of the Bankruptcy Code. The circuit courts are divided. See, e.g. *Kham & Nate's Shoes No. 2 v. First Bank*, 908 F.2d 1351 (7th Cir. 1990) (dicta) (questioning continued vitality of absolute priority rule); *In re Anderson*, 913 F.2d 530, 532-33 (8th Cir. 1990) (exception exists); *In re U.S. Truck Co.*, 800 F.2d 581, 587-88 (6th Cir. 1986). Bankruptcy courts have been sharply divided on the issue. Compare *In re Outlook/Century, Ltd.*, 127 B.R. 650, 656 (Bankr. N.D. Cal. 1991) and *In re Lumber Exchange Ltd. Partnership*, 125 Bankr. 1000 (Bankr. Minn. 1991) (no new value exception), with *In re Sawmill Hydraulics, Inc.*, 72 B.R. 454, 456 n.1 (Bankr. C.D. Ill. 1987).

⁶ 127 B.R. 650 (Bankr. N.D. Cal. 1991).

amount of the Bancorp secured claim and not paying the unsecured claim in full would violate the absolute priority rule.

In effect, on the basis of these findings and conclusions, Bancorp is entitled to relief on both of its motions. The motion for stay relief ought to be granted for cause under Section 362(d)(1) since the debtor's proposed plan is not capable of being confirmed, and the motion to dismiss is appropriate for the same reason under the provisions of Section 1112(2). Although it is difficult to perceive of any necessity to keep the case open since the Bonner Mall is the main purpose of the attempted reorganization, some purely practical reason may exist. Therefore, Bancorp's motion for stay relief will be granted, and the motion to dismiss will be denied at this time.

A separate order will be entered.

Dated this 6th day of December, 1991.

/s/Alfred C. Hagan
ALFRED C. HAGAN
U.S. BANKRUPTCY JUDGE

ACH:jbc

EXCERPT OF 11 U.S.C. § 1129

§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

...

(8) With respect to each class of claims or interests-

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

...

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

...

(B) With respect to a class of unsecured claims-

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.